IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.11 OF 2007
IN
N.D.P.S.SPECIAL CASE NO.5 OF 2006

Iran Khan S/o Kasam Khan Pathan ...Petitioner.
Versus
The State of Maharashtra ...Respondent.

....

Mr.S.S.Khan, Advocate for the Petitioner.
Mr.K.V.Saste,APP, for State.

....

CORAM : SMT.V.K.TAHILRAMANI,J.
DATED : 28th March, 2007.

P.C.:

1. Heard the learned Advocate for the petitioner-orig.accused No.2 and the learned APP for the State.

2. Rule. Rule made returnable forthwith, by consent. The learned APP for the State waives service of the notice for the respondent.

3. The petitioner is an accused in NDPS Special Case No.5 of 2006 which is pending before the learned Sessions Judge, Thane. It is the case of the prosecution that the coaccused who was found in possession of contraband had purchased it from the present petitioner. The petitioner had applied to

the trial Court for discharge on the ground that he was falsely implicated and in spite of completion of investigation and filing of charge-sheet, except the statement of coaccused there is absolutely no material against the petitioner.

4. The learned Advocate for the petitioner has submitted that there is no incriminating evidence against the petitioner nor recovery of any contraband drug is made from or at the instance of the petitioner. The Court below has rejected the application on the sole basis that dycetyl morphine was seized from the possession of the coaccused Ashraf Ali and Ashraf Ali has stated that the petitioner sold the contraband to him.

5. The coaccused Ashraf Ali has stated to the Police that he purchased the contra band from the present petitioner. Hence on the statement of coaccused, the petitioner was arrested on 21.1.2006 from his residence at Rajasthan. Besides this, the prosecution is relying on some record to show that coaccused Ashraf Ali had made some telephone calls to the present petitioner.

6. Having considered the rival submissions and after perusal of record there is substance in the grievance made on behalf of the petitioner before this Court that there is absolutely no material against them except the statement of co-accused and the record to show that coaccused Ashraf Ali had made some telephone calls to the present petitioner. Even the learned APP fairly accepts this position. He was unable to point out any other material on record to implicate the petitioner.

7. The learned Advocate for the petitioner has rightly placed reliance on the exposition of the Apex Court in **Suresh Budharmal Kalani Alias Pappu Kalani Vs. State of Maharashtra**, reported in **1998 S.C.C. (Cri.) 1625 : [1999 ALL MR (Cri) 95 (S.C.)],** in particular paragraphs 6 and 7 of the said decision. The Apex Court has observed that at the stage of framing of the charge the Court is required to confine its attention to only those materials collected during investigation which can be legally translated into evidence and not upon further evidence that the prosecution may adduce in the trial which would commence only after the charges are framed and the accused denies the charges. The Apex

Court then relying on the exposition in the case of **Kashimira Singh Vs. State of M.P.**, reported in **A.I.R. 1952 S.C. 159** has observed that, confession of co-accused cannot be called in aid to frame charges against accused in the absence of any other evidence to do so. In the present case except the statement of co-accused there is no other independent evidence.

8. As far as the telephone record is concerned, as there is no material regarding conversation during the telephone calls, in such case, relying on the records which show that the calls were made by coaccused to the present applicant without any other further material would not be sufficient to implicate the petitioner in this case and it could not be sufficient material to proceed against the petitioner. A priori, it will not be open to frame any charge against the petitioner herein. In view of this settled legal position, the application filed by the petitioner before the trial Court for discharge ought to have been allowed. Accordingly, the petitioner succeeds. Impugned order is set aside and Misc.Application preferred by the petitioner before the trial Court is allowed. Order accordingly.

(SMT.V.K.TAHILRAMANI,J.)